



## MONTGOMERY COUNTY ETHICS COMMISSION

Kenita V. Barrow  
*Chair*

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**March 2, 2015**

### **Advisory Opinion 15-02-003 Waiver 15-02-003**

David Perdue is the Chair of the Board of Appeals. He has approached the Ethics Commission for an advisory opinion on an issue of law, and, if necessary, a waiver of the restriction if it is deemed to apply.<sup>1</sup> Mr. Perdue owns 350 shares of Costco Wholesale Corporation (“Costco”). Costco has submitted a petition for a special exception to the Board of Appeals to build a gas station at the Costco store at the Westfield Wheaton mall. The Board of Appeals can either grant or deny the petition. According to his request, the most recent quarterly filing of Costco states that there are 438,760,000 shares of Costco stock outstanding. Mr. Perdue’s 350 shares as a percentage of that total is .00007% and have a value of over \$1000.

While the Ethics Commission has determined that the County’s conflict of interest laws are implicated by Mr. Perdue’s proposed activity, the Commission waives the application of the conflict of interest law for reasons identified below. Therefore, Mr. Perdue may consider the Costco petition so far as the Montgomery County Public Ethics Law is concerned. The Commission also identifies some other considerations beyond its jurisdiction relevant to Mr. Perdue’s consideration of the Costco matter.

#### **I. Applicability of Section 19A-11 of the Montgomery County Public Ethics Law**

The threshold issue is whether Mr. Perdue’s stock ownership in Costco triggers the conflict of interest prohibition contained in Section 19A-11 of Montgomery County’s

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<sup>1</sup> Normally, where an advisory opinion is issued, the identity of the person seeking the opinion remains confidential. Similarly, where an application for a waiver is considered and denied, the waiver request is confidential. Waivers that are granted are required to be published. . . . Here, with the consent of Mr. Perdue, the Ethics Commission is publishing the advisory aspects of this waiver as it is part of the response to the granted waiver request.

Public Ethics Law, requiring Mr. Perdue to either be recused from the Costco petition matter or seek a waiver from the Ethics Commission.

Section 19A-11 provides, in pertinent part:

- (a) *Prohibitions.* Unless permitted by a waiver, a public employee must not participate in:
  - (1) any matter that affects, in a manner distinct from its effect on the public generally, any:
    - (A) property in which the public employee holds an economic interest;
    - (B) business in which the public employee has an economic interest; or
    - (C) . . .
  - (2) any matter if the public employee knows or reasonably should know that any party to the matter is:
    - (A) any business in which the public employee has an economic interest.

The three cited provisions, (a)(1)(A),(B) and (a)(2)(A), address participating in a matter involving a property or business in which the employee has “an economic interest.” For purposes of these provisions, the term “economic interest” has the meaning given it in paragraph 19A-11(c):

- (c) *Thresholds.* In this section, interest or economic interest only includes:
  - (1) any source of income, direct or indirect, if the employee:
    - (A) received more than \$1,000 from that source of income in any of the last 3 years;
    - (B) is currently receiving more than \$1,000 per year from that source of income; or
    - (C) is entitled to receive at least \$1,000 in any year in the future from that source of income;
  - (2) a business in which the public employee owns more than 3 percent;
  - (3) securities that represent ownership or can be converted into ownership of more than 3 percent of a business; and
  - (4) any other economic interest worth more than \$1,000.

Mr. Perdue asks whether his stock holding in Costco constitutes an “economic interest” that would, without the grant of a waiver, prohibit his participation in the matter of the Costco petition for a special exception. The Commission determines that Mr. Perdue’s holding of 350 shares of Costco stock is an “economic interest” pursuant to subparagraph 19A-11(c)(4) and that consequently, paragraph 19A-11(a) would prohibit his participating in the Costco matter, unless the Commission waives the applicability of the restriction.

At the outset, the Commission acknowledges that paragraph 19A-11(c) is ambiguous and susceptible to more than one reading. In deciding that the provision applies to stock

holdings of greater than \$1000, the Commission relies on a number of factors.

There is no Commission opinion that directly addresses the ambiguity in the law. However, Ethics Commission waivers have consistently applied subparagraph 19A-11(c)(4) as applying to holdings of publicly traded stock. So, for example, with respect to a matter before the County Council concerning solid waste disposal, the “Ethics Commission [found] that [a Council member’s \$28,000] economic interest in [publicly traded] Waste Management’s stock exceeds the minimum \$1,000 threshold applicable to Section 19A-11.” See Waiver 1992-10, November 6, 1992. The Commission granted a waiver for the Council Member to participate in discussions and decisions regarding certain matters pertaining to solid waste disposal that could impact specific vendors, including Waste Management. Also see, Waiver 1992-11, November 6, 1992, concerning the same issue and another Council Member’s ownership interest in Waste Management. Similarly, an interest of a Council Member in Federal Realty Investment Trust was assumed to “exceed[] \$1000. As a result, [this] ownership of shares in Federal Realty Investment Trust constitute an economic interest as defined under Section 19A-11(c).” Waiver 1994-3, July 12, 1994. Also see, for example, a waiver issued to the County Executive for “stock holdings . . . modest in value but exceed the \$1,000 threshold imposed by the Ethics Law.” Waiver 1996-8. Also see Waivers 1997-3 and 1997-5. In addition, the Commission notes that the version of the Public Ethics Law prior to 1989 contained a provision that included in the definition of “financial interest” “any other financial interest worth more than \$1000”. With respect to this early version of the statute, the Ethics Commission issued a waiver with respect to a relatively minor holding of Washington Gas Light stock by a County employee working on a matter affecting that company. (July 8, 1988.)

In 1989, the “worth more than \$1000” portion of the definition of financial interest was moved to Section 19A-11 to define threshold “economic interests” covered by that Section. In 1989, proposed amendments to both the \$1000 in income threshold for economic interests and the “other economic interest worth more than \$1000” threshold included exceptions for “publicly traded stocks” so that these two threshold provisions would not apply to holdings of publicly traded stocks. These proposed exceptions were rejected after opposition to the amendments indicated that the income and worth thresholds should apply to publicly traded stocks without regard to the 3% ownership threshold. At the time, the argument was made by the critics of the proposal that otherwise a person could hold millions of dollars of public company stock without triggering a conflict of interest. One Councilmember thought an employee with an investment in a public company could have a predisposition towards favoring the public company even where the economic benefit of the employee’s action to the employee would be immeasurably small. The proposed changes to the law were rejected, and while the law that was enacted is not clear, what is clear is that there was no intent to exclude holdings of over \$1000 of publicly traded stocks from the “other economic interest” provision in subparagraph 19A-11(c)(4).

The Commission notes that the long-standing treatment of the County Attorney’s office to stock holdings worth over \$1000 through, for example, ethics training to employees,

has been to treat such holdings as triggering the Section 19A-11 prohibition. Lastly, the Commission notes the legislative findings and the statement of policy preceding the substantive provisions of the Public Ethics Law, encourage a liberal construction of the law.<sup>2</sup>

While the basic prohibition of Section 19A-11 applies, the Commission recognizes that there is a relevant exception to Section 19A-11. Subparagraph 19A-11(b)(1) provides:

If a disqualification under subsection (a) leaves less than a quorum capable of acting, or if the disqualified public employee is required by law to act or is the only person authorized to act, the disqualified public employee may participate or act if the public employee discloses the nature and circumstances of the conflict.

Here, where there are four other members of the Board of Appeals who may act in the matter, there is no question of whether a quorum is present. The Montgomery County Zoning Ordinance provides at 59-A-4.122 that “not less than 3 members of the Board constitutes a quorum.”<sup>3</sup> For the Board of Appeals to grant a special exception, a vote of a supermajority of four of the Board is required. See Zoning Ordinance at 59-A-4.123. The exception to Section 19A-11 also makes reference to the “only person authorized to act.” If one of the Board Members were unavailable to participate in the consideration of a petition for a special exception, the remaining four officials would each be in the status of “the only person[s] authorized to act” since four members are needed to act. (While the exception appears to address individual authority to act, there is no reason the provision should be limited to individuals when all members of a finite group constitute the only persons who are authorized to take an action.) But this exception does not apply in the current instance because all of the Board members aside from Mr. Perdue are available to participate in the matter.

Accordingly, the Commission concludes that without a waiver, Mr. Perdue is prohibited from participating in the Costco application by the prohibition of Section 19A-11.

## II. Applicability of Section 2-109 of the County Code

Before addressing the issue of whether a waiver of Section 19A-11 should issue, the Commission addresses a separate provision of the County Code appearing at Section 2-

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<sup>2</sup> The council’s stated intent to have liberal interpretation does not extend to criminal prosecution of the County law, and, indeed, given the ambiguous nature of the provision, the Commission questions whether the interpretation the Commission is giving the provision would be enforceable in a criminal prosecution. The Commission believes this provision should be clarified.

<sup>3</sup> The references to the County’s Zoning Ordinance are to the Zoning Ordinance in place at the time of the initiation of the Costco petition.

109. As discussed below, the Ethics Commission concludes that this provision does not prohibit Mr. Perdue from participating in the Costco petition matter.<sup>4</sup>

Section 2-109 specifically addresses conflicts of interest of Board of Appeals members:

Sec. 2-109. Code of ethics.

(b) *Conduct prohibited.* No member shall:

(1) Decide or participate in a decision in which he has a financial interest, as owner, member, partner, officer, employee, stockholder or other participant of or in any private business or professional enterprise that will be affected by such decision, nor shall a member knowingly participate in a decision affecting a person related to him or his spouse as father, mother, brother, sister or child. This section shall not be construed to prohibit a member from having or holding private investment, business or professional interests, but shall be construed to apply when such interests are or reasonably may be in conflict with the proper performance of duty by the member. Such interests shall be presumed to be in conflict with proper performance of duty by the member when he or his spouse, or the father, mother, brother, sister or child or either, jointly or severally, owns a total of more than three (3) percent of the invested capital or capital stock of any groups, firms, corporations or associations involved in the decision being made by the board of appeals or receives a total combined compensation of more than five thousand dollars (\$5,000.00) per year from any individual groups, firms, corporations or associations involved in the decision being made by the board of appeals. . . .

(d) *Disclosure of interests; disqualifications.* When a member has any interest as described in this section which is or reasonably may be incompatible with or in conflict with any of his official duties or acts, he shall disclose such interest publicly and he shall disqualify himself and not participate in the decision or act affected thereby. . . .

(f) *Effect of conflict of interests.* If, because of disqualification or disqualifications by interest under the provisions of this section, less than a quorum of the board of appeals is available to act upon any particular matter, except special exceptions, the remaining members of the board shall constitute a quorum and shall have authority to transact business to the extent permitted by law; provided, that this shall not be construed to permit transaction of business contrary to the quorum requirements or other provisions of state or other law.

This particular provision sets forth a standard for when a financial interest may create a conflict of interest and further sets forth the circumstance when a financial interest based on ownership interest or revenue can be presumed. In the instance of Mr. Perdue's

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<sup>4</sup> Section 19A-7 specifically references section 2-109 as being a statute on which the Ethics Commission may give advice. While the Ethics Commission is authorized to issue an opinion concerning the applicability of 2-109, interestingly, no express authorization is made for the Ethics Commission to issue a waiver of 2-109 in Section 19-8(a).

ownership interest in Costco, the interest does not nearly reach the amounts necessary to create the presumption of a conflict of interest. While the thresholds for a presumption of a conflict are not met, the interest held must also be examined against the statutory standard for a conflict of interest of a Board of Appeals member.

The conflict of interest provision “shall be construed to apply when such interests are or reasonably may be in conflict with the proper performance of duty by the member.” The Ethics Commission believes that this standard could be met in certain cases where a stock holding does not meet the provision creating a presumption of conflict. But, the Commission believes this provision should be viewed in the context of the paragraph as a whole. As the provision expressly addresses when a presumption of a stock holding creates a conflict of interest, an inference may be drawn that a stock holding that does not meet the threshold can be presumed not to be a conflict of interest without a showing of something more, such as when there is some *material* relationship between the ownership interest of the Board member and the matter under consideration by the Board.

Under the circumstances presented here, the Commission, noting that the presumption threshold of Section 2-109 has not been met, concludes that there is not a material relationship between the petition of Costco and Mr. Perdue’s ownership of 350 shares of the Company sufficient to override the inference of no conflict in 2-109. As presented in Mr. Perdue’s submission, Costco is a company with \$112 billion in annual revenue. Mr. Perdue submits that the gas station could result in an additional \$64 million of annual revenue to Costco. If all of that was viewed as profit, which it clearly would not be, the amount in theory that would be Mr. Perdue’s share would be about \$45.00.<sup>5</sup> Under these circumstances, the Commission concludes that the presumption of no conflict that may be inferred from Section 2-109 is not overcome by this interest. In other words, Section 2-109 does not prohibit Mr. Perdue’s participation in the matter.

### III. Waiver of Section 19A-11

Section 19A-8 sets forth the standard for the issuance of a waiver by the Ethics Commission. It provides:

- (a) After receiving a written request, the Commission may grant to a public employee . . . a waiver of the prohibitions of this Chapter and Sections 11B-51 and 11B-52(a) if it finds that:
  - (1) the best interests of the County would be served by granting the waiver;

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<sup>5</sup> Ethics Commission’s rough analysis suggests the value to Mr. Perdue’s shares would be about \$11.00. According to Costco’s FY 2014 annual report, gasoline sales were one tenth of Costco’s total revenue; with 445 gas stations, that would suggest average revenue per gas station of 1/4450 of Costco’s total revenue. Assuming revenues and their sources correlate proportionately to a stock’s price, 1/4450 times a recent stock price of \$147 would suggest .03 cents of relative value of one particular gas station to a share of Costco stock. \$.03 x 350 is about \$11.00.



- (2) the importance to the County of a public employee or class of employees performing official duties outweighs the actual or potential harm of any conflict of interest; and
- (3) granting the waiver will not give a public employee or class of employees an unfair economic advantage over other public employees or members of the public.

The Ethics Commission concludes that Mr. Perdue's request for a waiver meets these requirements.

First, the best interests of the County would be served by granting the waiver. It is in the County's interest that the statutory framework for consideration of an application for a special exception works as designed. These applications require a supermajority of the votes of Board members – four out of five. If a Board member is disqualified from participation in the matter, the applicant is required to have all four of the participants vote in favor of the project – thus one hundred percent rather than eighty percent. While the Commission determined that the exception of subparagraph 19A-11(b)(1) to ensure a quorum does not apply in Mr. Perdue's case, the rationale for that exception applies to an extent here: the exception is to ensure that Government is not prevented from functioning. Disqualifying Mr. Perdue would result in the Board operating at less than full capacity and would result in a diminution of the service the Board provides to the County.

The second waiver criterion is also met as the importance of Mr. Perdue's service outweighs the actual or potential harm of any conflict of interest. As explained previously, if four of the members approves the application for a special exception, Mr. Perdue's financial benefit, using a very generous model for projecting potential value, could be \$45. (See Footnote 5 for a separate rough analysis.) No doubt these calculations are speculative in terms of analyzing the potential value of the Costco gas station at Westfield Wheaton mall. But what is not speculative is that the total value in dollars of Costco's application to Mr. Perdue is very small. Non-participation by a member on a vote on a petition for a special exception of the Board of Appeals is the equivalent of a "no" vote; the Ethics Commission believes that Mr. Perdue's participation in the matter is better and more important to have than what would be, effectively, an automatic "no" vote on the petition.

The Commission takes notice that Mr. Perdue is but one of five members of the Board of Appeals. While his role is important, especially as Chair, the decision of whether to grant a special exception is not his alone.

The last criterion of Section 19A-8 for the Ethics Commission to grant a waiver is also met. There is no unfair economic advantage to Mr. Purdue in participating in the review of the application of Costco for a special exception. Aside from being speculative, any increase in value of Mr. Perdue's shares is *de minimis* and insufficient to be considered by the Commission to constitute an "unfair economic advantage."

IV. Other Considerations

While the Ethics Commission finds that Section 2-109 does not apply and grants Mr. Perdue a waiver of the restrictions of Section 19A-11 of the Public Ethics Law, the Commission notes that when the Maryland judiciary has addressed the question of recusal of quasi-judicial bodies, including the Montgomery County Board of Appeals, it has referred to the Maryland Code of Judicial Conduct. See, for example, Huntington Terrace Citizens Ass'n v. Suburban Hospital, No. 1251, Md. Ct. Sp. App., September 10, 2013 (unreported). These standards are beyond the jurisdiction and purview of the Ethics Commission, but the Commission makes particular note of comment 4 to the Code of Judicial Conduct which suggests that a judge should disclose all information that parties might find relevant to a possible motion for disqualification even where the judge does not believe his judgment could reasonably be in question.

For the Commission:



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Kenita V. Barrow, Chair